



ARIZONA HOUSE OF REPRESENTATIVES

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First Regular Session

HB 2691: groundwater permits; technical correction

S/E ADEQ; water quality programs; WOTUS

Sponsor: Representative Griffin, LD 14

Committee on Natural Resources, Energy & Water

Summary of the Strike-Everything Amendment to HB 2691

Overview

Authorizes certain water quality programs within the Arizona Department of Environmental Quality to cover waters that are no longer considered "waters of the United States."

History

Clean Water Act

The Clean Water Act prohibits discharges of pollutants into "waters of the United States" (WOTUS) unless a permit is obtained from one of this law's regulatory programs. This law also delegates certain responsibilities to state governments. To that end, the Arizona Department of Environmental Quality (ADEQ) administers:

- 1) *Arizona Pollutant Discharge Elimination System (APDES) Program*—This program regulates point source discharges of pollutants and storm water runoff into WOTUS in Arizona ([A.R.S. § 49-255 et seq.](#));
- 2) *Water Quality Standards*—ADEQ has adopted water quality standards in rule for WOTUS to protect those waters for present and future uses based on factors such as current use and the protection of public health ([18 A.A.C. 11](#)). Standards can also be established for other waters, such as pumped groundwater that is not used for drinking water ([A.R.S. § 49-221 et seq.](#)); and
- 3) *Total Maximum Daily Load Program*—When a water does not meet water quality standards, ADEQ, through the Total Maximum Daily Load program, establishes limits on the amount of pollutants this water can receive and still meet water quality standards. These limits are implemented through permit limitations and ADEQ's Nonpoint Source Program ([A.R.S. § 49-231 et seq.](#)).

Defining Waters of the United States

In response to a 2017 executive order, the U.S. Environmental Protection Agency and Army Corps of Engineers adopted a narrower definition of WOTUS, which became effective in June 2020 ([85 Federal Register 22250](#)). As a result of this change, certain waters within Arizona are no longer covered under the Clean Water Act.

Provisions

General Provisions

1. Replaces *navigable water* with *WOTUS* as it relates to the following programs' scope:
 - a) Voluntary Remediation Program (Sec. 1);
 - b) Section 401 discharges (Sec. 3);
 - c) Surface Water Quality General Grazing Permit (Sec. 4);
 - d) APDES program as it relates to discharging pollutants into *WOTUS* (Sec. 5);

- e) Program to control nonpoint source discharges into *WOTUS* (Sec. 5);
- f) Dredge and Fill Permit Program (Sec. 5, 23-25);
- g) General Water Quality Standards (Sec. 7);
- h) Water Quality Standards for *WOTUS* (Sec. 8);
- i) Water Quality Monitoring (Sec. 9);
- j) Total Maximum Daily Load Program's requirement to create a list of impaired waters to comply with the Clean Water Act (Sec. 11);
- k) Total Maximum Daily Load Program's process for establishing total pollutant loadings and draft allocations for an *impaired WOTUS* (Sec. 13); and
- l) Establishing compliance with an APDES permit as it relates to ADEQ's water quality standards (Sec. 19)

General Provisions for Water Quality Control

- 2. Redefines:
 - a) *Environment*, in part, to include *WOTUS* instead of *navigable waters*;
 - b) *Permit* to specify that when regulating non-*WOTUS protected surface waters*, this term does not include provisions governing the construction, operation or modification of a facility (Sec. 2); and
 - c) *Point source* to mean any discernible, confined and discrete conveyance from which pollutants are or may be discharged to *WOTUS* or *protected surface waters*. (Sec. 2)
- 3. Adds definitions for *effluent-dependent water*, *ephemeral water*, *intermittent water*, *non-WOTUS protected surface water*, *non-WOTUS waters of the State*, *ordinary high water mark*, *perennial water*, *protected surface waters*, *public waters*, *wetland*, *WOTUS* and *WOTUS protected surface water*. (Sec. 2)
- 4. Deletes the definition of *navigable waters*. (Sec. 2)

Water Quality Standards

- 5. Instructs the ADEQ Director to:
 - a) Apply surface water quality standards established as of January 1, 2021 for *WOTUS* to non-*WOTUS protected surface waters* until specifically changed by this official;
 - b) Adopt, by rule, water quality standards for non-*WOTUS protected surface waters* by December 31, 2022; and
 - c) When adopting water quality standards for non-*WOTUS protected surface waters*, consider the characteristics of Arizona's surface waters and the economic, social and environmental costs and benefits that would result from adopting a water quality standard at a particular level or for a particular water category. (Sec. 7)
- 6. Prohibits rules on the anti-degradation, anti-degradation criteria and outstanding Arizona waters from being adopted or applied as water quality standards for non-*WOTUS protected surface waters*. (Sec. 7)
- 7. Requires the ADEQ Director to maintain and publish a Protected Surface Water List (List) and further requires the initial List to be published on ADEQ's website and in the Arizona Administrative Register (AAR) within 30 days after this law's effective date. (Sec. 7)
- 8. Mandates that ADEQ adopt by rule this List—including procedures for determining economic, social and environmental costs and benefits—by December 31, 2022. (Sec. 7)
- 9. Declares that publishing the List in the AAR is an appealable agency action which can be appealed by any party that provides evidence of an actual adverse effect that it would suffer as a result of the ADEQ Director's decision. (Sec. 7)

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10. Requires the List to include:
 - a) All *WOTUS*;
 - b) Any perennial, intermittent and ephemeral reaches and any impoundments of specified rivers, not including tributaries or reaches of waters wholly within tribal jurisdiction or reaches of waters outside the United States; and
 - c) Any non-*WOTUS* waters of the state that are added by the ADEQ Director.
11. Prohibits the List from containing specified non-*WOTUS* waters. (Sec. 7)
12. Requires the ADEQ Director to add specified non-*WOTUS* surface waters to the List. (Sec. 7)
13. Allows the ADEQ Director to include additional non-*WOTUS* surface waters on the List if all the following apply:
 - a) The water is not required to be listed as a non-*WOTUS* surface water;
 - b) The water is not a non-*WOTUS* water that is excluded under this section; and
 - c) The economic, environmental and social benefits of adding the water outweigh the economic, environmental and social costs of excluding the water from the List. (Sec. 7)
14. Requires the ADEQ Director to remove any erroneously listed, non-*WOTUS* waters from the List when the water is excluded under this section and prohibits this official from regulating discharges to those waters in the interim. (Sec. 7)
15. Instructs the ADEQ Director to remove non-*WOTUS* from the List when the water is not required to be listed and the economic, environmental and social benefits of removing the water outweigh the economic, environmental and social costs of retaining it. (Sec. 7)
16. Authorizes the ADEQ Director, on an emergency basis, to add a water to the List if there is an imminent and substantial danger to public health or welfare or the environment under the criteria for adding non-*WOTUS* surface waters. (Sec. 7)
17. Stipulates that this emergency addition will take effect on the Director's decision and that waters added will be incorporated into the List during the next rulemaking. (Sec. 7)
18. Directs ADEQ, within 30 days after this emergency decision, to publish a notice of that determination on its website and in the AAR. (Sec. 7)

Total Maximum Daily Load Program

19. Redefines:
 - a) *Impaired water* to mean a *protected surface water* for which credible scientific data satisfies the statutory requirements for being listed as *impaired* and:
 - i. For non-*WOTUS protected surface waters*, demonstrates the APDES-required effluent limitations are not stringent enough to achieve applicable surface water quality standards; and
 - ii. For *WOTUS*, demonstrates that it should be identified pursuant to the Clean Water Act's requirements water quality standards and implementation plans (Sec. 10); and
 - b) *Surface water quality standard* as those adopted for *protected surface waters* and, for *WOTUS*, that demonstrate it should be identified per the Clean Water Act and its regulations. (Sec. 10)
20. Prohibits *total maximum daily loads* for non-*WOTUS protected surface waters* from being subject to the EPA's review, approval or enforcement. (Sec. 10)
21. Mandates that ADEQ prepare:
 - a) A list of *impaired non-WOTUS protected surface waters* by December 31, 2022 and provide public notice and the opportunity to comment on this list; and
 - b) Written responses to comments and publish the list of *impaired non-WOTUS protected surface waters* and a summary of the responses to comments in the AAR. (Sec. 11)

22. Declares that publishing this list in the AAR is an appealable agency action that any party who submitted written comments on the draft list can pursue. (Sec. 11)
23. Requires ADEQ to adopt—before listing a *protected surface water* as impaired and after providing opportunity for public notice and comment—implementation procedures that identify the objective basis for determining violations of the narrative or biological criterion. (Sec. 11)
24. Authorizes ADEQ to add or remove a water from this list using a specified process outside of the normal listing cycle if it collects or receives credible and scientifically defensible data that meets statutory requirements. (Sec. 11)
25. Instructs the ADEQ Director to apply rules that establish a methodology for identifying impaired *WOTUS* to non-*WOTUS protected surface waters* until specifically changed by rule and further requires this official to update the rules within a year after adopting surface water quality standards for non-*WOTUS protected surface waters*. (Sec. 11)
26. Requires the list that sets a priority ranking for *impaired waters* and includes a schedule for developing required *total maximum daily loads* to apply to *protected surface waters* instead of *navigable waters* but clarifies that loads are still required for any listed *WOTUS*. (Sec. 12)
27. Requires ADEQ to develop *total maximum daily loads* for *impaired protected surface waters* consistent with the Clean Water Act or when it determines these loads are necessary to restore an *impaired water*. (Sec. 13)
28. Authorizes ADEQ to estimate *total maximum daily loads* for *protected surface waters* that are not listed as *impaired* once it has developed loads for all impaired *WOTUS* or if needed to support permitting of new point source discharges. (Sec. 13)
29. Declares that the following apply when establishing total pollutant loadings and draft allocations for non-*WOTUS impaired waters*:
 - a) Allows ADEQ to prepare a draft estimate of the total amount of each pollutant that causes impairment from all sources that may be added to the water while still complying with applicable surface water quality standards;
 - b) Requires ADEQ to determine draft allocations among contributing sources that are sufficient to achieve the total loadings;
 - c) Directs ADEQ to provide public notice and allow for comment on each draft estimate and allocation and further requires it to prepare written responses to comments received on draft estimates and allocations; and
 - d) Instructs ADEQ to publish its determinations for total pollutant loadings that will not result in impairment and the draft allocations among contributing sources that are sufficient to achieve the total loading with a summary of responses to comments in the AAR. (Sec. 13)
30. Prohibits ADEQ, if it receives a notice of appeal within 45 days after publishing loadings and allocations for *WOTUS* in the AAR, from submitting these determinations to the EPA regional administrator until the challenge is withdrawn or the ADEQ Director has made a final administrative decision. (Sec. 13)
31. Instructs ADEQ, for waters that are *impaired* due to historical factors that are difficult to address, to consider those factors when determining allocations for existing point source discharges of pollutants that caused the impairment. (Sec. 13)
32. Directs ADEQ, after adopting a total maximum daily load and implementation plan for a *protected surface water*, to review that water's status at least once every five years to assess if it has reached compliance with applicable surface water quality standards. (Sec. 13)

Aquifer Protection Permits

33. Requires the owners of injection wells, land treatment facilities, dry wells, on-site wastewater treatment facilities with a capacity of more than 3,000 gallons per day, recharge facilities or facilities that discharge to *protected surface waters* that have individual or area-wide permits to annually register these permits with the ADEQ Director and pay registration fees based on the total daily discharge of pollutants. (Sec. 14)
34. Stipulates that a storm water general permit must be issued to storm water management facilities regulated by the APDES Program if certain conditions are met, including that the facility's owner or operator obtained an APDES permit for storm water discharges. (Sec. 15)
35. Requires a general permit to be issued for point source discharges to *protected surface waters* from man-made bodies of water associated with golf courses, parks and residential common areas that contain groundwater, storm water or reclaimed wastewater (or some combination therein) if, among other conditions, the discharges are subject to an APDES permit. (Sec. 16)
36. Exempts from aquifer protection permit requirements:
 - a) Surface impoundments that are only used to contain storm runoff, except for those regulated by the APDES Program;
 - b) Discharges to a facility that is solely used for surface transportation or storage of groundwater, surface water for beneficial use or reclaimed water that is regulated by statute for beneficial use if those discharges are regulated by the APDES Program; and
 - c) Point source discharges caused by a storm and authorized in an APDES permit. (Sec. 17)

Arizona Pollutant Discharge Elimination System Program

37. Instructs the ADEQ Director to:
 - a) Apply the APDES Program and its rules to discharges to non-WOTUS *protected surface waters* consistent with this bill's provisions for program components and rules that do not apply to non-WOTUS *protected surface waters*, but exempts discharges to non-WOTUS *protected surface waters* incidental to a recharge project from this program if the project is permitted under an aquifer protection permit or an underground storage facility permit or if it is designed with the primary objective of retaining and recharging stormwater runoff that is otherwise unregulated in statute; and
 - b) Consider evidence gathered by the Arizona Navigable Stream Adjudication Commission when deciding whether an APDES permit is required to discharge. (Sec. 5)
38. Broadens the APDES Program to cover non-WOTUS *protected surface waters*. (Sec. 18)
39. Includes in the definition of *discharge* adding a pollutant to a *protected surface water* from any point source which does not include the addition of dredged material or fill material to the non-WOTUS *protected surface water*. (Sec. 18)
40. Establishes an alternative definition for *indirect discharge* as, for a *publicly owned treatment work* that discharges to non-WOTUS *protected surface waters*, introducing pollutants from any domestic source that would be regulated under the Clean Water Act if the *publicly owned treatment work* was to discharge to a WOTUS. (Sec. 18)
41. Adds, to the definition of *publicly owned treatment works*, a treatment work that discharges to a *protected surface water*. (Sec. 18)
42. Clarifies that someone cannot discharge except in conformance with the APDES Program for WOTUS. (Sec. 19)
43. Prohibits the ADEQ Director from adopting any requirement for WOTUS that is more stringent than those in Clean Water Act or that conflicts with the act's requirements. (Sec. 19)

44. Instructs the ADEQ Director to apply the Pretreatment Program to *publicly owned treatment works* that discharge to a non-*WOTUS protected surface water*. (Sec. 20)
45. Clarifies for the Sewage Sludge Program that, except as otherwise required by APDES, the ADEQ Director cannot adopt any requirement that is more stringent than those in the Clean Water Act or that conflicts with the act's requirements. (Sec. 21)
46. Declares that any permits and permit conditions for discharges to non-*WOTUS protected surface waters* do not implement any sections of the Clean Water Act and are not subject to EPA review, approval or enforcement. (Sec. 22)
47. Instructs the ADEQ Director to apply the APDES Program rules to non-*WOTUS protected surface waters* until that official adopts rules for discharges to non-*WOTUS protected surface waters*, except that the ADEQ Director is not required to follow any provisions related to EPA review, approval or involvement in permit review or approval. (Sec. 22)
48. Prohibits the ADEQ Director from adopting or applying rules for the following discharges to non-*WOTUS protected surface waters*:
 - a) Definitions, limitations, or prohibitions on discharges from new sources or new dischargers;
 - b) Technology-based effluent limitations, standards or controls, including new source performance standards under the Clean Water Act, except as applied to discharges from publicly owned treatment works;
 - c) Requirements to express all permit limitations, standards, or prohibitions for a metal in terms of total recoverable metal; and
 - d) Requirements for EPA review and approval of permits before issuance. (Sec. 22)
49. Authorizes the ADEQ Director to adopt rules for discharges to non-*WOTUS protected surface waters* that cannot include requirements that are more stringent than those in the Clean Water Act. (Sec. 22)
50. Forbids the ADEQ Director from construing any rule to require EPA oversight of permits or parts of permits for discharges to non-*WOTUS protected surface waters*. (Sec. 22)
51. Stipulates that a rule will not apply if it would require the EPA's review, approval or enforcement of discharges to non-*WOTUS protected surface waters*. (Sec. 22)
52. Prohibits the ADEQ Director from imposing duplicative requirements for permits to discharge to *WOTUS* and non-*WOTUS protected surface waters*. (Sec. 22)
53. Instructs the ADEQ Director to adopt by rule best management practices and notification requirements to ensure that specified activities do not violate applicable surface water quality standards and directs this official to only include those best management practices that extend to these activities. (Sec. 22)

Local Stormwater Quality Programs

54. Authorizes a county that is required to obtain coverage under an APDES permit to:
 - a) Develop and implement stormwater pollution prevention plans and stormwater management programs as prescribed by statute;
 - b) Adopt, amend, repeal and implement any ordinances, rules, or regulations necessary to comply with statute;
 - c) Adopt rules, regulations or ordinances regulating the use of lands or rights-of-way it owns or leases as necessary to implement or enforce its national or state pollutant discharge elimination system stormwater management program;
 - d) Enforce ordinances, rules or regulations consistent with statute; and
 - e) Seek civil penalties up to \$2,500 per violation. (Sec. 28)

55. Requires an ordinance, rule or regulation adopted as part of this program, or any stormwater management program that a county develops and implements, to be no more stringent than or conflict with the APDES program. (Sec. 28)
56. Directs a county that operates a regulated small municipal separate storm sewer system that discharges to a *protected surface water* to conduct its pollution discharge elimination system program and limit the application of any ordinance, rule or regulation:
- a) By operating such a system that discharges to non-*WOTUS protected surface waters* as if it discharged to a *WOTUS protected surface water*; and
 - b) As necessary to meet the public education and outreach, public involvement and participation requirements as provided by APDES program. (Sec. 28)
57. Specifies that the definition of *county* for this program means one that operates a regulated small municipal separate storm sewer system consistent with federal regulations. (Sec. 28)

Local Water Pretreatment

58. Authorizes an Arizona municipality, county or sanitary district to adopt, amend or repeal any ordinances necessary to implement and enforce pretreatment requirements under the APDES program. (Sec. 29)

Miscellaneous

59. Makes technical and conforming changes. (Sec. 1-3, 5-8, 11-13, 15, 17-21, 23-24, 26, 27-30)